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Supreme Court of the United States

OCTOBER TERM 1952

No. 583

JOSEPH H. LYONS and JESSIE H. LYONS, individually and as co-partners doing business under the name and style of LYONS ELECTRICAL DISTRIBUTING COMPANY,

Petitioners,

against

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

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Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petitioners above named, Joseph H. Lyons and Jessie H. Lyons, individually and as co-partners doing business under the name and style of Lyons Electrical Distributing Company, hereby respectfully petition the Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit to certify to this Court, for review, its proceedings and judgment, dated and filed January 21, 1953, affirming an order of the United States District Court for the Southern District of New York, made November 21, 1952 (R. 55-6).

The order thus affirmed denied, in an anti-trust suit, the motion of petitioners for an order staying the respondent as one of two defendants in the anti-trust suit, during the pendency of the anti-trust suit, from proceeding further in an action against the plaintiffs it then had pending in the Supreme Court of the State of New York, for a

judgment requiring the petitioners to account to said defendant as an alleged "agent" under alleged agreements between the parties—with leave to the respondent, if so advised, to plead in this action as a further counterclaim the cause alleged in said State Court action (R., 22, 53).

The Opinions Below

The opinion of the District Court (R., 51-2) is not officially reported. The substance thereof was that the Court was without power to grant the applied-for injunction "even though the Anti-Trust Laws are involved in both actions".

The opinion of the Court of Appeals (R., 55) is not yet reported. It reads as follows:

> "*Per Curiam:*
>
> The defendants in the prior state court action brought by Westinghouse raised the defense of illegality of the contract sued on. Thereafter they brought the present action in the federal court and sought to stay further proceedings in the state court. Judge Bondy rightly held that 28 U. S. C. A. 2283 prevents the issuance of such a stay. The appellants' attempt to distinguish *Red Rock Cola Co.* v. *Red Rock Bottlers, Inc.,* 5 Cir., 195 Fed. (2d) 406, and *Bascomb Launder Corp.* v. *Telecoin Corp.,* 9 F. R. D. 677 (D. C. S. D. N. Y.), is not persuasive. We agree with those decisions."

Jurisdiction

This petition is submitted pursuant to 28 U. S. C. 1254 (1).

The appeal to the Court of Appeals was taken under 28 U. S. C. 1292.

The Question Presented

Since the District Court denied the injunction, and the Court of Appeals affirmed it, solely on the ground of *want of power,* the question is:

> Is a district court in which an anti-trust action is pending pursuant to Sections 15 and 26 of Title 15 of the U. S. Code (vesting jurisdiction exclusively in the federal courts) without power—despite the injunctive power specifically vested by Section 26—to enjoin a defendant therein from proceeding in a state court action wherein the same basic issue is presented by way of a defense to an action which is not maintainable if the anti-trust action is well taken?

The Statutes Involved

15 U. S. C., sec. 15:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, ch. 323, § 4, 38 Stat. 731.)"

15 U. S. C., sec. 26:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections 13, 14, 18 and 19 of this title, when and under the same

conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, . . . (Oct. 15, 1914, ch. 323, § 16, 38 Stat. 737.)"

Judicial Code, Sec. 1651, Writs:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law."

Judicial Code, Sec. 2283, Stay of State Court Proceedings:

"A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The Matter Involved

This is an action for treble damages under the anti-trust laws (see Complaint, R., 2-13).

It is against the General Electric Company and the respondent, as co-conspirators.

This action was commenced on July 8, 1952 (R., 1). Answers were filed September 18, 1952 (R., 1). The answer of Westinghouse Electric Corporation (hereinafter referred to as Westinghouse) contains a counterclaim (R., 18-19).

Five months before this action was commenced, Westinghouse brought action in the New York State Supreme Court for an accounting under a series of so-called "agency contracts" between the plaintiffs and Westinghouse, covering the period from July 1, 1944 to December 31, 1951 (R., 25; complaint in the State Court action, R., 29-31). On June 19, 1952, the answer in the Westinghouse State Court action was amended to plead Westinghouse's violation of the anti-trust laws as a defense of illegality (R., 26, 33-5).

That defense in the State Court action is that the alleged contracts therein sued on were "an integral part" of the charged conspiracy "to monopolize the manufacture, distribution and sale of electric lamps in the United States, to restrain and render impossible a free market and competition therein and to fix the prices of such lamps and maintain uniformity in such prices". The conspiracy embraced a plan "not to sell electric lamps in the usual course of trade, but only through alleged 'agents' " required and compelled "to observe uniform price schedules and allowances as from time to time agreed upon among said conspirators" (R., 33).

The State Court action is for an accounting under a series of such "agency" contracts (R., 29-31).

General Electric Company is not a party to the State Court suit.

Within less than 20 days after the interposition, in the State Court action, of the defense of illegality under the anti-trust laws, this action in the United States District Court was brought (see *U. S.* v. *General Electric Co., Westinghouse, et al.,* 82 Fed. Sup. 753, where defendants were found guilty of monopoly, etc.).

A comparison of the first cause of action of the complaint herein (R., 2-8) with the defense of illegality in the State Court action (R., 33-5) shows that the gravamen of this action is pleaded as a defense to the State Court

action. In addition, the counterclaim in the Westinghouse answer is on two of the contracts on which Westinghouse is suing in the State Court action (R., 24-6, 31).

Under the anti-trust laws (15 U. S. C., Secs. 12-33), only the Federal Court is competent and has exclusive jurisdiction to grant affirmative relief (15 U. S. C., Secs. 15, 26; *Remington Rand, Inc.* v. *International Business Machine Corp.*, 167 Misc. 108 and cases cited therein). However, if the contracts sought to be enforced in the State Court action are illegal by virtue of violation of those laws, the State Court is Constitutionally bound not to enforce them (see *Remington Rand, Inc.* v. *International Business Machine Corp., supra,* and cases cited therein).

If the State Court action should go to trial and result in a judgment in favor of Westinghouse, doubtessly, the latter would set up that judgment as *res judicata* in the District Court action. If such a defense were held well taken—and there is danger that it might—the District Court thus would be deprived of its exclusive jurisdiction to determine the merits of this action, and the plaintiffs herein would be deprived of having their cause of action under the federal anti-trust laws determined by a federal court in accordance with the practices and procedures therein prevailing.

As is well known to the Court, the pre-trial discovery and examination procedure in the New York state courts is limited and restricted in contrast to the practice in the federal courts. That difference is extremely important in a case of this character, particularly where one of the alleged conspirators is not a party and cannot be made a party to the State Court action. The plaintiffs herein as defendants in the State Court action might suffer a defeat in the State Court solely because of the limitations and restrictions on pre-trial examination and discovery, whereas with a free hand to examine anyone whatsoever who had a participation in the matter and to discover

relevant papers and documents in whomever's possession they may be would bring about a different result.

It is the petitioner's belief that the *national* policy laid down in Sections 15 and 26 of Title 15 of the United States Code that actions under the anti-trust laws shall be maintainable and maintained only in the federal courts necessarily implies that the merits shall be determined by the federal courts in accordance with federal court practice and procedure and that there shall be no interference therewith by or through or as a result of adjudications by said courts.

Conformable to that view, petitioners respectfully seek a determination by this Court that the suit provisions of Section 15 of Title 15 and the injunction provisions of Section 26, as well as the general course of equity, are ample to empower the federal courts to issue injunctions necessary to prevent the procurement of determinations in state courts which would or might interfere with their freedom to make their own determinations of the merits of anti-trust suits.

Reasons for Granting the Writ

1. It is respectfully submitted that the orders sought to be reviewed involve *an important question of power in the federal courts*—a question which, in respect to actions under the anti-trust laws, has not been passed on by this Court.

There appear to be only four decisions on this point, including this case. In *Katz Drug Co.* v. *Sheaffer Pen Co.*, 6 F. Sup. 212 (D. C., Mo., 1933), not mentioned in the opinion of the Court of Appeals, the injunction was granted. In the two cases mentioned in the Court of Appeals—one in the Fifth Circuit and the other in the District Court in New York, the Court was held without power. The point does not seem otherwise to have been passed on.

The fact that the point has *arisen three times* (including this case) within the past *two years* indicates the increasing importance thereof.

2. Moreover, the holding in this case, it is submitted, is in conflict with what we believe to be the completely analogous cases of *Bowles* v. *Willingham,* 321 U. S. 503 (1944), *Porter* v. *Lee,* 328 U. S. 246 (1946), *Porter* v. *Dicken,* 328 U. S. 252 (1946), *Fleming* v. *Rhodes,* 331 U. S. 100 (1947), and with the reasoning of *Steelman* v. *All Continent Corp.,* 301 U. S. 278 (1937). In all of those cases, provisions in federal statutes for injunctions and enforcement thereof were held to vest in the federal courts the power to enjoin continuation of parallel State Court proceedings, even though, as is not the case in the antitrust statutes, those statutes conferred concurrent jurisdiction.

ARGUMENT

The courts below erred in holding that the District Court was without power to grant the applied for injunction.

(1). It may be well to note at the outset that since this Court's decision in *Toucey* v. *New York Life Insurance Co.,* 314 U. S. 118 (1941), then Section 265 of the Judicial Code, reading:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy"

was superseded, in the 1948 revision, by present Section 2283, reading, as quoted at page 4, *supra:*

> "A Court of the United States may not grant an injunction to stay proceedings in a State Court except

as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

In the *Toucey* case, this court noted that despite the very restrictive language of Section 265 and its predecessors, injunctions of proceedings in state courts, because of provisions in other statutes and historical considerations, were grantable in a number of classes of cases. This court listed five such classes in addition to "*res* cases".

It may well be doubted that the specification was intended to be deemed all-embracive. In any event, thereafter the list was added to by this court and other courts.

The language of Section 265, therefore, did not reflect the actual law. In rectification, the revisers of the Code changed the language as noted above.

Moore in his *Commentary on the United States Judicial Code* (at pp. 396-7, 407, 411) says that the purpose of the revised language was to modify the law as laid down in the *Toucey* case and to restore the "judicial flexibility" which the courts exercised prior to the "rigid philosophy underlying" the *Toucey* decision.

(2). It is noteworthy also that although former Section 265 set forth as its sole exception "cases where such injunction may be authorized by any law relating to proceedings in bankruptcy", the Bankruptcy Law contained no express authorization to enjoin proceedings in other courts.

The Bankruptcy Act merely invested courts of bankruptcy with general jurisdiction "at law and in equity" to "make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title" (Bankruptcy Act, Section 2, subd. 15; see

Steelman v. *All Continent Corp., supra,* 301 U. S. 278, at pp. 288-290). Therefore, injunctions of state court proceedings which might conflict with the proper administration of the Bankruptcy Act were upheld not because they were specifically provided under the Bankruptcy Act but because bankruptcy courts were also district courts and the reading of the quoted provision together with the power which the court possessed *qua* district court resulted in the possession of whatever power was required to prevent adjudications by other courts which might interfere with full execution of the Bankruptcy Act. The power was exercised whether or not there was involved a *res* in the possession, actual or constructive, of the bankruptcy court (*Steelman* v. *All Continent Corp., supra,* at p. 291). The power was described as "inherent in a court of bankruptcy, as it is in a duly established court of equity" (at pp. 288-9).

(3). Hence, when Congress enacted the Emergency Price Control Act of 1942 and in Section 205(a) thereof authorized the Administrator to "make application to the appropriate court for an order enjoining" acts or practices in violation of the Act—even though the Act expressly provided for jurisdiction in the state courts as well as the federal courts and the quoted provision referred to any "appropriate court" and not only to a federal court—this Court held that the United States District Courts were empowered to issue injunctions restraining parties from continuing proceedings in the state courts which the District Court deemed would result in a violation of the statute (*Bowles* v. *Willingham, supra,* 321 U. S. 503 (1944).

It may not be amiss to note that the Emergency Price Control Act of 1942 was on the statute books at the time of the *Toucey* decision. Not having been included therein in the classes of cases in which it was held injunctions might issue, in the *Bowles* decision, that statute was "added to"

the list of statutes "which operated as implied legislative amendments" to then Section 265 and its predecessors (at p. 510), and this Court explained (at pp. 510-512, Emphasis supplied):

> "By Section 205 (a) the Administrator is given authority to seek injunctive relief in the appropriate court (*including the federal district courts*) against acts or practices in violation of Section 4, e. g., the receipt of rent in violation of any regulation or order under Section 2. Moreover, by Sec. 204 (d) of the Act one who seeks to restrain or set aside any order of the Administrator or any provision of the Act is confined to the judicial review granted to the Emergency Court of Appeals, which was created by Section 204 (c) and to this Court."
>
> * * * * *
>
> "The rule expressed in Sec. 265 [of the Judicial Code] which is designed to avoid collisions between state and federal authorities (*Toucey* v. *New York Life Insurance Co., supra*) thus does not come into play. *The powers of the District Court under § 205 (a) of the Act and § 24 (1) of the Judicial Code are ample authority for that court to protect the exclusive federal jurisdiction which Congress created.*
>
> The suggestion is made that Congress could not constitutionally withhold from the courts of the States jurisdiction to entertain suits attacking the Act on constitutional grounds. But we have here a controversy which arises under the Constitution and laws of the United States and is therefore within the judicial power of the United States as defined in Art. III, § 2 of the Constitution. Hence Congress could determine whether the federal courts which it established should have exclusive jurisdiction of such cases or whether they should exercise that jurisdiction concurrently with the courts of the States [citations]. *Under the*

present Act all jurisdiction has not been withheld from state courts, since they have concurrent jurisdiction over all civil enforcement suits brought by the Administrator. § 205 (c). But the authority of Congress to withhold all jurisdiction from the state courts obviously includes the power to restrict the occasions when that jurisdiction may be invoked."

Sections 15 and 26 of Title 15 (the anti-trust laws) seem to us fully the equivalent of Section 205(a) of the Emergency Price Control Act of 1942. Section 24(1) of the then Judicial Code, in substance, is repeated in Sections 1331 and 1332 of the present Judicial Code.

Indeed, power in the present case seems clearer, for while the Emergency Price Control Act contained provisions for the exercise of concurrent jurisdiction by the State courts, the Federal anti-trust laws are enforceable exclusively in the Federal courts. Moreover, the ultra restrictive language of former Section 265 has since yielded to the broad reservation of power contained in present Section 2283.

The completeness of the power to restrain proceedings in State courts which may interfere with the proper enforcement of rights under Federal statutes was made still clearer in this Court's later decisions under the Emergency Price Control Act: *Porter* v. *Lee, supra; Porter* v. *Dicken, supra; Fleming* v. *Rhodes, supra.*

In *Porter* v. *Lee, supra,* the landlord brought a State court proceeding to recover possession and thereafter the Administrator applied to the Federal District Court for an injunction to restrain the landlord from continuing that proceeding. The District Court denied that application for lack of power. The proceeding in the State court then resulted in a judgment of eviction. The Administrator then

made a new application for an injunction to restrain the enforcement of the judgment of eviction. Relief again was denied for want of power. This Court reversed. The landlord made the cogent argument that under the express provisions of the Act he had the right to proceed in the State court and since the State court was bound to observe the provisions of the Federal Act, the tenant's rights in the light and under that Act could and should have been litigated in the State court. But this Court held (at p. 250):

> "that contention is without merit . . . the landlord's eviction proceeding in the Justice of the Peace court clearly was not an enforcement proceeding authorized by the Act. It was, rather, if the allegations of the Administrator proved to be true, a violation of the Act. The State Court's jurisdiction was based on state law and not on Section 205 of the Price Control Act. It was therefore not part of the 'concurrent' jurisdiction contemplated by Section 205. . . . It was consequently within the power of the Federal District Court to grant the injunction, provided the Government succeeded in proving the merits of its case" (at p. 250).

Completely parallel is this case: Westinghouse's State court action is not under any provision of the anti-trust laws conferring upon the State court "concurrent" jurisdiction, nor under any other federal law; on the contrary, the anti-trust laws provide for exclusive jurisdiction in the Federal courts. The Federal issue is presented in the State court action precisely in the way in which, as was properly argued, it could have been raised and adjudicated by a plea in defense in the case enjoined in *Porter* v. *Lee.*

Further explaining the basis for injunctions by Federal courts of proceedings in State courts involving issues under

the Emergency Price Control Act, this Court, in *Porter* v. *Dicken, supra,* said that the power, and consequent duty arose

> "because Section 205 [of that Act] authorized the Price Administrator to bring injunction proceedings to enforce the Act in *either* the State or Federal courts, and this authority is broad enough [by construction] to justify an injunction to restrain State court evictions" (328 U. S. at p. 255).

To that this Court added that if Section 265 of the Judiciary Act were held to control, "the Administrator here could not proceed in the Federal court, since there is a proceeding pending in the state court" and thereby the Administrator would be compelled to go into the State courts whereas Section 205 authorized him to seek relief in another court.

All of that, we submit, *a fortiori* controls here where the jurisdiction to enjoin and award damages or other affirmative relief is *exclusively* in the federal courts.

(4). Other decisions have recognized that provisions in other statutes establishing areas of Federal judicial jurisdiction, justify, and for the proper discharge of the jurisdiction require, injunctions of State court proceedings (see *Moore's Commentary on the United States Judicial Code*—to which the learned District Court referred in its opinion—at p. 410); included are cases of habeas corpus, Fair Labor Standards, Labor Relations, Public Utility Holding Act. The latter was included by a decision of the United States Court of Appeals for the Second Circuit, *Okin* v. *Security Exchange Commission,* 161 Fed. (2d) 978 (1947), wherein a party was restrained from proceeding with litigation in the State court which if carried to a successful conclusion might contravene the provisions of the Federal statute.

(5). None of the statutes which thus were held to empower and require injunction of proceedings in State courts made any express provision for such injunctions. It was inferred from provisions which merely conferred on the Federal courts the general jurisdiction to issue orders and enter judgments in furtherance of the enforcement of the acts. The relied on provisions were substantially no different from Section 26 of Title 15 of the U. S. Code (quoted at pp. 3-4, *supra*) relied on here, except that some of them (unlike Sections 15 and 26 of Title 15 which apply here) expressly provided for *concurrent* jurisdiction by the State and Federal courts. Even such express provision for concurrency was held not to derogate from the power of the Federal courts nevertheless to enjoin proceedings in the State courts when the latter appeared to result or to threaten to result in determinations or acts contrary to the statute as interpreted by the enjoining Federal court.

(6). In accordance with the views here urged, an injunction was granted in *Katz Drug Co.* v. *Sheaffer Pen Co.*, 6 F. Sup. 212 (D. C., Mo. 1933). The court in that case held that the provisions of Sections 15 and 26 of Title 15 require the Federal District Court wherein an action thereunder was pending to enjoin the defendant from proceeding with a previously brought state court action in antagonism to the Federal action.

In that case the defendant had brought an action against the plaintiff in a State court in Iowa to restrain the plaintiff from selling its products. That was in furtherance of its endeavor, paralleled in this case, "to maintain standard uniform prices" by selling only under "contract with selected dealers" and refusing to sell to dealers who declined to maintain the prices. Apparently some of the "selected dealers" surreptitiously attempted to violate their contracts by sneakingly obliterating the serial numbers and

then secretly selling them to other dealers to sell at subcontract prices; the purpose of the obliteration was to avoid detection of the dealer who was violating his agreement. To eliminate that practice, the defendant brought the Iowa action to restrain the sale of pens from which the serial numbers had been removed. The plaintiff then brought suit in the United States Court against the defendant (the plaintiff in the State court action) charging violation of the anti-trust laws and sought an injunction to restrain the defendant from proceeding in the Iowa state case on the ground that the action was in furtherance of the defendant's violation of the anti-trust laws. After taking note of the injunction provisions of Section 26 of Title 15 the Court, in the light of those provisions, granted the applied for injunction for the following:

> "two reasons: First, because the prosecution of said action is alleged to be a part of a plan and purpose to maintain prices illegally; and, second, because full and adequate relief could only be had in the federal court, and the prosecution of said action according to the bill would be an impingement upon the jurisdiction of this court and an interference with complete relief. The rights of the parties can be fully adjudicated here and they cannot be in the Iowa proceeding."

It is submitted that neither the opinions in this case nor in *Red Rock Cola Co.* v. *Red Rock Bottles, Inc.* and *Bascomb Launder Corp.* v. *Telecoin Corp.*, cited therein, address themselves to the effect of the injunctive provisions of Section 26 of Title 15. Nor do those opinions consider or give effect to the enlargement of the injunctive power by the revision of old Section 265 of the Judicial Code to present Section 2283.

(7). It is respectfully submitted that the applied for injunction should have been granted as coming within

two of the exceptions provided for in Section 2283, namely:

(1) it is "authorized Act of Congress", to wit, Section 26 of Title 15 of the U. S. Code;

(2) it is "necessary in aid of [the] jurisdiction" of the District Court in that a determination in the State court may interfere with that court's performance of its duty under Section 15 of Title 15 and prevent a proper adjudication of the plaintiff's rights under the applicable Federal statutes.

As to the second consideration, it is obvious that a State Court determination which would hamper the District Court in making—or oust that court of its jurisdiction to make—an independent determination of the issues under the anti-trust laws presented by the complaint, would be an interference with the discharge by that court of its function and duty under the anti-trust laws—laws, which, of course, under the Constitution, are part of the paramount law of the land to which state law and state jurisdiction must yield.

The reasons for injunction here are stronger than in *Ring* v. *Spina,* 148 F. 2d 647 (2 Cir. 1945), where the United States Court of Appeals for the Second Circuit stayed arbitration proceedings (which the defendant had instituted) to await the determination of plaintiff's later anti-trust suit.

(8). The priority in time in the commencement of the State and Federal actions, of course, is not material.

In the *Steelman* case, the injunction halted a Federal case to await the outcome of a subsequently commenced State court case. In the *Bowles* and *Porter* cases and in the *Katz* case, as well as in *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175 (1920), the State court proceedings preceded the commencement of the cases in the Federal

courts. So were the arbitration proceedings in *Ring* v. *Spina, supra.* Priority of commencement is an important consideration only when there is no reason for choice between completely concurrent jurisdictions (see *Hammett* v. *Warner Bros.*, 176 Fed. (2d) 145, 150, 2 Circ. (1949).

(9). It may not be amiss to note that the courts of New York do not hesitate, in proper cases, to enjoin parties from instituting or continuing with actions in other jurisdictions, including United States courts (*Garvin* v. *Garvin*, 302 N. Y. 96).

PRAYER

Wherefore petitioners respectfully pray that this petition for a writ of certiorari to review the complained of order and judgment be granted.

Dated, New York, N. Y., January 30, 1953.

JOSEPH H. LYONS,
JESSIE H. LYONS,
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By COPAL MINTZ,
Attorney for Petitioners.

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FEB 28 1953

IN THE

Supreme Court of the United States

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Petitioners,

v.

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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February 26, 1953

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

JOSEPH H. LYONS and JESSIE H. LYONS, individually and as co-partners doing business under the name and style of Lyons Electrical Distributing Company,

Petitioners,

v.

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

No. 583

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 51-52) is not officially reported. The opinion of the Court of Appeals (R. 55) has not yet been officially reported.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254(1).

QUESTION PRESENTED

Does a federal district court in which a federal antitrust action is pending have the power to stay the prosecution of a prior action brought in a state court by defendant (respondent here) against plaintiffs (petitioners here) and in which the latter have pleaded the federal antitrust laws as a defense?

STATUTES INVOLVED

Judicial Code, 28 U. S. C. § 2283. *Stay of State court proceedings*

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

STATEMENT

The Facts

Respondent employed petitioners as agents, for a period of seven and one-half years, in connection with the sale and distribution of electric light bulbs and fluorescent tubes (R. 29). After a partial audit of petitioners' accounts in 1951, it was found that the reports which had theretofore been made by petitioners to respondent were fraudulent (R. 41-42).

An action for an accounting was brought by this respondent against these petitioners in the New York State

Supreme Court on February 8, 1952 (R. 40). By an amendment to their answer in that court, petitioners asserted a defense of illegality under the antitrust laws (R. 33-34). Thereafter, petitioners brought the present action for treble damages against respondent and General Electric Company.

The state court accounting action having been placed on the calendar for trial, petitioners moved in the federal court to prevent a state court trial on respondent's right to an accounting (R. 22). The affidavit in support of the motion complained that petitioners' assertion of the same facts in both the state and federal courts would necessitate certain duplications of trial and pre-trial procedures (R. 27). Although this burden was voluntarily assumed by petitioners, they none the less contend that they should be given relief by way of a stay of the prior state court proceedings.

Since the entry of the order of which a review is here sought, the state court action has been set down for trial on March 10, 1953.

Argument

POINT I

THE JUDICIAL CODE FORBIDS AN INJUNCTION UNDER THE CIRCUMSTANCES OF THE PRESENT CASE.

Since the beginning of our federal form of government, there has been a basic principle of comity that federal courts will not interfere with or enjoin state court proceedings except in certain specific situations. This principle was

first enacted into law in 1793 and is presently found as Section 2283 of the Judicial Code:

> "§ *2283. Stay of State court proceedings*
>
> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments" (28 U. S. C. § 2283).

Section 2283 acknowledges only three exceptional circumstances in which a court of the United States may enjoin a state court proceeding, namely, (a) where "expressly authorized by Act of Congress", (b) "where necessary in aid of its jurisdiction", or (c) "to protect or effectuate its judgments". No one of these three circumstances is found in the present case.

1. There is no applicable Act of Congress authorizing a grant of the injunction sought here. All federal statutes coming within this exception were listed by this Court in *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118 (1941). The Emergency Price Control Act of 1942 was added to this list in *Bowles* v. *Willingham*, 321 U. S. 503, 510 (1944). None of those statutory exceptions has any application to the present situation.

2. Neither is there any outstanding judgment of this Court to be protected under the final clause of the statute. In the reviser's note to § 2283, it was stated that the phrase "to protect or effectuate its judgments", added to the former § 265, was to apply to "relitigation of cases and contro-

versies fully adjudicated by such [Federal] courts", the situation involved in the *Toucey* case, *supra.*

3. The only phrase of the statute which could give rise to any possible question of intepretation is the exception "where necessary in aid of its jurisdiction". This exception has been held to include only two types of civil cases:

(a) Jurisdiction over removed actions, and

(b) Jurisdiction over *in rem* actions where the *res* is in the *prior* possession of the federal court and is essential to the jurisdiction. *Toucey* v. *New York Life Ins. Co.,* 314 U. S. 118 (1941).

This is not a removed action. Furthermore, both the instant action and the accounting action in the New York State Supreme Court which petitioners here seek to enjoin are *in personam* actions. In each case, the respective courts have complete personal jurisdiction over the parties. This court, in explaining the rationale behind this point of jurisdiction in *Mandeville* v. *Canterbury,* 318 U. S. 47 (1943) said (pp. 48-49):

> "Section 265 of the Judicial Code, 28 U. S. C. § 379, provides that except as authorized by any law relating to proceedings in bankruptcy 'the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State'. To this sweeping command there is a long recognized exception that if two suits pending, one in a state and the other in a federal court, are *in rem* or quasi *in rem,* so that the court or its officer must have possession or control of the property which is the subject matter of the suits in order to proceed with the cause and to grant the relief sought, the court first acquiring jurisdiction or assuming

control of such property is entitled to maintain and exercise its jurisdiction to the exclusion of the other.

"In such cases this Court has uniformly held that a federal court may protect its jurisdiction thus acquired by restraining the parties from prosecuting a like suit in a state court notwithstanding the prohibition of § 265. This exception to the prohibition has been regarded as one of necessity to prevent unseemly conflicts between the federal and state courts and to prevent the impasse which would arise if the federal court were unable to maintain its possession and control of the property, which are indispensable to the exercise of the jurisdiction it has assumed. But where the judgment sought is strictly *in personam* for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as res judicata in the other. These principles were recognized and the authorities sustaining them collected in *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, and *Toucey* v. *New York Life Ins. Co.,* 314 U. S. 118, 134-36."

Similarly, in *Kline* v. *Burke Construction Co.,* 260 U. S. 226 (1922), this Court, speaking of Federal and State court actions said (p. 235):

". . . The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in

> actions *in personam*, involving a question of personal liability only, the rule applies in the former but does not apply in the latter."

The lower federal courts have consistently applied these principles to their constructions of Section 2283. Only two years ago, when faced with the precise situation here involved, Judge Coxe held in *Bascom Launder Corp.* v. *Telecoin Corp.*, 9 F. R. D. 677, 678 (S. D. N. Y. 1950) that:

> "Plaintiffs, however, are not entitled to an order staying defendant from prosecuting actions against them pending in the State courts. These actions are stated to be for the recovery of rental fees and for goods sold and delivered under contracts between defendant and them. Plaintiffs claim that these contracts violate the Anti-Trust laws and are void. But this court cannot stay proceedings in a State court, except as expressly authorized by an Act of Congress, or where necessary in aid of its own jurisdiction, or to protect or effectuate its own judgments. Section 2283, Rev. Title 28, U. S. C. A. The fact that, if plaintiffs are successful here, they may recover, as part of their damages, the amounts which they may be required to pay to defendant under any such State court judgments, does not justify this court in staying the prosecution of such State actions."

In *Red Rock Cola Co.* v. *Red Rock Bottlers, Inc.*, 195 F. 2d 406 (5th Cir. February 18, 1952), the Fifth Circuit Court of Appeals fully reviewed the applicable authorities in holding that an injunction could not properly issue under circumstances substantially identical with those of the present case. In that case, as here, the defendant in the federal action had previously instituted a contract action in the

state court to which a defense of illegality under the anti-trust laws was pleaded. The defendant in the state court action having asserted that defense then instituted a treble damage action in the federal court and, precisely as in the present case, called upon the United States Court to enjoin the state court action. The District Court granted the injunction. The Fifth Circuit unanimously reversed, saying (p. 410):

> "The suit for treble damages in the federal Court, and the suit in the State Court to have declared Cola's right to terminate the contract because of the failure of Bottlers to comply with the minimum purchase requirements are both proceedings *in personam.* As such, each Court is entitled to proceed without interference from the other. *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226. If the contract, or the secret formula or other rights under the contract, could in any view be considered as the *res,* the State Court first acquired jurisdiction. *Palmer* v. *Texas,* 212 U. S. 118, 29 S. Ct. 230, 53 L. Ed. 435. The further contention of the plaintiff that the question of breach of contract under the circumstances of this case is exclusively within the jurisdiction of the federal Court in its determination of the antitrust suit cannot be sustained. If, because contrary to the Anti-Trust Act, the acts inducing the breach are available as a defense in the State Court action (as in fact they have been asserted by the defendant in that proceeding), any erroneous action is subject to review by the United States Supreme Court. Cf. *Bruce's Juices* v. *American Can Co.,* 330 U. S. 743, 67 S. Ct. 1015, 91 L. Ed. 1219. If not so available as a defense, and therefore not a question which could be raised in the State Court, the result there would

not be *res adjudicata* in the suit in the federal Court. So in neither view could the judgment in the State Court prejudice the ultimate result of the federal Court proceeding."

Petitioners place principal reliance on four cases brought by former Administrators under the Emergency Price Control Act of 1942, and in their brief (Pet. 11, 13), set out extensive excerpts from the two leading cases in the group, *i.e., Bowles* v. *Willingham,* 321 U. S. 503 (1944), and *Porter* v. *Lee,* 328 U. S. 246 (1946). In each case, the portions omitted by appellants from their quotations contain a holding by this Court that the jurisdiction of the federal court under the Emergency Price Control Act of 1942 in the situation as given was exclusive.

Moreover, in the *Willingham* decision, this Court approved its previous analysis in *Toucey* v. *New York Life Ins. Co., supra,* adding the Emergency Price Control Act of 1942 as an additional statutory authority falling directly within the first exception under the provision which is now § 2283 of the Judicial Code.

Other than the rent cases and one exception hereinafter referred to, petitioners cite no authority involving an injunction similar to the one demanded in the court below. Authorities are cited for injunctions by one federal court against another federal court, *Steelman* v. *All Continental Co.,* 301 U. S. 278 (1937); for injunctions against individuals where no state court action was pending, *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175 (1920); for injunctions staying commercial arbitration, *Ring* v. *Spina,* 148 F. 2d 647 (2d Cir. 1945); and *Hammett* v. *Warner Bros.,* 176 F. 2d 145 (2d Cir. 1949) is cited, although no injunction of any type was involved in that case.

The one holding cited by petitioners which does bear upon the question raised before this Court is *Katz Drug Co.* v. *Sheaffer Pen Co.*, 6 F. Supp. 212 (D. C. Mo. 1933), where a Federal District Court in Missouri enjoined a prior Iowa state court action on the ground that the bringing of the Iowa action was in itself designed to further the anti-trust conspiracy charged. Even apart from this distinction, the courts below properly declined to follow the *Katz* case for the reason that it rests upon an improper reading of two earlier opinions of this Court.

The Missouri court there relied upon *Julian* v. *Central Trust Company*, 193 U. S. 93 (1904), and *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175 (1920). In both the *Julian* and *Wells Fargo* cases this Court was dealing with the validity of an injunction against an individual in the absence of any state court proceedings. In the *Julian* case, the federal court had sold property under a decree in a bankruptcy proceeding and had retained jurisdiction to determine all liens and claims against the estate. The court was held to have properly enjoined an individual who threatened to enforce a state court judgment against such property in another court.

Thus, even had there been a state court proceeding pending at the time, the *Julian* decision would have been valid as being in aid of the federal court's *in rem* jurisdiction.

The *Wells Fargo* case again was concerned with an injunction granted against an individual in the absence of any pending state proceedings. The injunction was against the enforcement of a judgment in a prior state court action, which was procured in fraud of a contract asserted in the federal court, and this Court distinguished § 265 of the Judicial Code, stating:

"... 'While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud.'

"...

"Without pursuing the subject further, we hold that the present suit is not one to stay proceedings in a state court in the sense of § 265" [pp. 185-86].

It is submitted that neither the *Julian* decision nor the *Wells Fargo* decision lend any support to the contention that a federal court may enjoin state court proceedings other than as provided by Section 2283 of the Judicial Code.

POINT II

PETITIONER HAS NOT SHOWN ANY REASON WHY THE PETITION SHOULD BE GRANTED.

In stating the reasons why, in their opinion, a writ of certiorari should be granted, petitioners have urged only two points, which are:

(1) that the decision of the court below involves an important question of federal law which should now be settled by this Court (Pet. 7); and

(2) that the decision of the court below is in conflict with decisions of this Court (Pet. 8).

A. The Decision of the Court Below Involves a Non-Final Order and Review Is Not Warranted.

Petitioners here seek review of an interlocutory order. Although this Court concededly has power under Title 28 U. S. C., Section 1254(1), to issue its writ of certiorari to review non-final orders, the cases emphasize that the power of interlocutory review is to be exercised only in "extraordinary cases". Moreover, the fact that an order is not final may constitute, of itself, sufficient ground for denial of the application. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U. S. 251, 258 (1916).

Those "extraordinary cases" in which this Court has issued the writ to review non-final determinations have either posed jurisdictional issues "fundamental to the further conduct of the cases", *Land* v. *Dollar,* 330 U. S. 731, 734 (1947), important issues of constitutional law, *United States* v. *General Motors Corp.,* 323 U. S. 373 (1945), or issues of such great importance as to warrant the grant despite the interlocutory stage of the case, *Johnson* v. *Eisentrager,* 339 U. S. 763 (1950).

The issue posed by the order here sought to be reviewed is neither jurisdictional (*Smith* v. *Apple,* 264 U. S. 274 (1924)) nor constitutional.

On petitioners' own admissions, it is clear that the application does not involve a question of great importance. It is, for example, conceded that the issue upon which review is sought has arisen only four times in the 39 years since enactment of the Clayton Act and that it has never created any disagreement in the decisions of Courts of Appeals (Pet. 7). These concessions in themselves belie the contention that the issue is one of importance.

B. The Decision of the Court Below Is Not in Conflict with Decisions of This Court.

Petitioners have urged that the decision of the court below conflicts with decisions of this Court in *Bowles* v. *Willingham,* 321 U. S. 503 (1944), *Porter* v. *Lee,* 328 U. S. 246 (1946), *Porter* v. *Dickson,* 328 U. S. 352 (1946), *Fleming* v. *Rhodes,* 331 U. S. 100 (1947), and *Steelman* v. *All Continental Corp.,* 301 U. S. 278 (1937). Our discussion under Point I above has demonstrated that disposition of this case is not controlled by the aforementioned decisions. Because those decisions are inapposite, it is manifest that the decision below cannot conflict with them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Office - Supreme Court, U.
FILED
MAR 3 1953
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 583

JOSEPH H. LYONS and JESSIE H. LYONS, individually and as co-partners doing business under the name and style of LYONS ELECTRIC DISTRIBUTING COMPANY,

Petitioners,

v.

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY MEMORANDUM

While not material, petitioners respectfully controvert the reference to fraud contained in respondent's statement of "the facts" (at p. 2 of its brief).

Respondent's complaint in the State Court action does not allege—it studiously, it seems, refrains from alleging—fraud or anything which may be viewed as amounting to fraud; it alleges only that certain payments "were less than the amounts that should have been paid pursuant to the terms of the contracts between the parties"—

without further enlightenment (R. 30). The answer denies that allegation (R. 33) and alleges, to the contrary, that Lyons had "kept plaintiff fully advised of their acts and transactions insofar as they related to plaintiff and the lamps received from plaintiff and plaintiff approved all of said acts and transactions," that Lyons had "rendered reports on the forms provided by the plaintiff and plaintiff accepted said reports" and "defendants made payments to the plaintiff in accordance with said reports and plaintiff accepted said payments" (R. 32-3).

The term "fraudulent" appears only in a statement "on information and belief" in an attorney's affidavit submitted in opposition to the motion for injunction—without specification of facts or evidence (R. 41-2). Such a statement of course is not probative, much less a basis for a definitive statement of fact.

Respectfully submitted,

COPAL MINTZ,
Attorney for Petitioner.

March 2, 1953.